No. 16,021

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellee,

vs.

CHARLES BASSIL CLEMENTS, JR.,
Appellant.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

JURISDICTION.

This is an appeal from an order denying a motion to vacate sentence under 28 U.S.C. § 2255. Jurisdiction is based upon 18 U.S.C. §3231 and 28 U.S.C. §§ 1291, 1294 and 2255.

STATEMENT OF THE CASE.

The appellant is confined at the United States Penitentiary at Leavenworth, Kansas, having pleaded guilty to two violations of 18 U.S.C. §2421 (Mann Act). The eight-count indictment was returned and filed on March 20, 1957. The defendant pleaded guilty before Judge Murphy on April 24, 1957, to counts 1 and 2. Count 1 charged the commission of an offense

on March 23, 1952; count 2 charged the commission of an offense on March 27, 1952. Thus, the indictment was returned and filed just a few days before the five year statute of limitations, 18 U.S.C. §3282, would have run as to the two offenses here involved. The remaining six counts of the indictment charged offenses occurring somewhat later.

Also on April 24, 1957, the defendant was sentenced to serve five years on each of the two counts, the sentences to run concurrently. On March 31, 1958, the defendant filed a motion under 28 U.S.C. §2255 to vacate his sentence, noticing the motion for hearing on April 21, 1958. In his moving papers the defendant claimed that the prior three year statute of limitations applied and that, if the extended five year statute of limitations applied, the extension was an ex post facto law.

On April 1, 1958, without a hearing, Judge Murphy denied the motion to vacate. This appeal is from the order denying the motion.

SUMMARY OF ARGUMENT.

The extension of the statute of limitations from three years to five years applies not only to offenses committed on and after the date of enactment of the extension but also to offenses committed prior to that date if prosecution was not then barred. Therefore, the five year statute applies here and prosecution is timely. The ex post facto clause does not prevent application of the extension because prosecution was

not barred at the time of the extension. The denial of appellant's motion without a hearing was proper because the motion raised only questions of law which could be determined from the motion and the record.

ARGUMENT.

1. THE FIVE YEAR STATUTE OF LIMITATIONS APPLIES.

The extension of the statute of limitations became effective on September 1, 1954. At that time the three year statute had not run as to this prosecution. The amendment, 68 Stat. 1145, states that the extended period applies to offenses committed before enactment if prosecution was not then barred. Accordingly, the increased period of limitations is clearly applicable here. *United States v. Kurzenknabe,* 136 F. Supp. 17 (D.N.J. 1955). Appellant now seems to concede as much. Whereas, in his moving papers, he urged that the five year statute of limitations did not apply, he does not make any such contention in his brief.

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2. THE EXTENSION OF THE STATUTE OF LIMITATIONS AS TO A PROSECUTION NOT YET BARRED IS NOT AN EX POST FACTO LAW.

It is clear that the ex post facto clause does not prevent extension of the period of prosecution, if, as here, the prosecution has not been barred at the time of the extension. *Falter v. United States,* 23 F.2d 420, 425-26 (2d Cir. 1928), and *United States v. Kurzenknabe,* supra.

The defendant's authorities involve attempts to revive prosecutions already barred. Interestingly, in *State v. Moore,* 42 N.J. Law 208 (1880), a case cited by the appellant (appellant's brief, p. 9), a statute reviving an already barred prosecution was held *not* to be an ex post facto law.

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3. THE DEFENDANT WAS NOT ENTITLED TO A HEARING.

Since "the motion and the files and records of the case conclusively show [ed] that the prisoner [was] entitled to no relief (28 U.S.C. §2255)," a hearing was unnecessary. Section 2255 itself provides, "A court may entertain and determine such motion without requiring the production of the prisoner at the hearing." Indeed, it would have been a waste of public money and against public policy to have ordered a hearing and to have ordered the prisoner produced.

The cases cited by the defendant, *Waley v. Johnston,* 316 U.S. 101 (1942), and *United States v. Hayman,* 342 U.S. 205 (1952), involved issues of fact which could not be determined from the record. Therefore, those cases are not of use to the defendant. Indeed, in *United States v. Hayman,* supra, the Court indicated that prisoners should be produced for Section 2255 hearings only when necessary (pp. 222-223):

> "The existence of power to produce the prisoner does not, of course, mean that he should be automatically produced in every Section 2255 proceeding. This is in accord with procedure in habeas corpus actions. Unlike the criminal trial

where the guilt of the defendant is in issue and his presence is required by the Sixth Amendment, a proceeding under Section 2255 is an independent and collateral inquiry into the validity of the conviction. Whether the prisoner should be produced depends upon the issues raised by the particular case. Where, as here, there are substantial issues of fact as to events in which the prisoner participated, the trial court should require his production for a hearing."

CONCLUSION.

The prosecution was timely. The motion was denied properly. It is respectfully submitted that the denial of the motion to vacate should be affirmed.

Dated, San Francisco, California,
August 5, 1958.

LLOYD H. BURKE,
United States Attorney,
BERNARD PETRIE,
Assistant United States Attorney,
Attorneys for Appellee.

(Appendix Follows.)

Appendix.

Appendix

INDICTMENT.

First Count: (Title 18, United States Code, Section 2421)

The Grand Jury charges that:

Charles Bassil Clements, Jr., hereinafter called said defendant, did on or about the 23rd day of March, 1952, in the City and County of San Francisco, State and Northern District of California, knowingly transport in interstate commerce, to-wit, from San Francisco, California, to Reno, Nevada, Betty La Verne Clements, a woman, for the purpose of prostitution.

Second Count: (Title 18, United States Code, Section 2421)

The Grand Jury further charges:

That on or about the 27th day of March, 1952, said defendant did, in the City and County of San Francisco, State and Northern District of California, knowingly transport in interstate commerce, to-wit, from Reno, Nevada, to San Francisco, California, Betty La Verne Clements, a woman, for the purpose of prostitution.

* * *

A True Bill.

/s/ W. J. Kohnke,
Foreman.

STATUTES INVOLVED.

18 U.S.C. §3282:

Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed. As amended Sept. 1, 1954, c. 1214, §10 (a), 68 Stat. 1145.

68 Stat. 1145:

Sec. 10. (a) 3282 of title 18 of the United States Code is amended by striking out "three" and inserting in lieu thereof "five".

(b) The amendment made by subsection (a) shall be effective with respect to offenses (1) committed on or after the date of enactment of this Act, or (2) committed prior to such date, if on such date prosecution therefor is not barred by provisions of law in effect prior to such date.

Approved September 1, 1954.

28 U.S.C. §2255:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to

apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention. June 25, 1948, c. 646, 62 Stat. 967, amended May 24, 1949, c. 139, §114, 63 Stat. 105.